

Editor's note: 90 I.D. 425; Appealed -- aff'd, Civ.No. 83-316 (E.D.Ky. May 2, 1985).

RIVER PROCESSING, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-627

Decided September 26, 1983

IBSMA 82-34

Appeal by the Office of Surface Mining Reclamation and Enforcement from the June 8, 1982, decision of Administrative Law Judge David Torbett, Docket No. NX 1-52-R, vacating the requirement in Notice of Violation No. 80-2-56-106 that River Processing, Inc., cover the exposed highwall at its Abes Branch surface coal mine in Perry County, Kentucky.

Affirmed in part, as modified, and reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

The complete elimination of highwalls is an absolute requirement of the Surface Mining Control and Reclamation Act and its implementing regulations and neither that Act nor those regulations provide authority for an

evaluation of comparative environmental harm from eliminating highwall exposures or allowing such exposures to remain.

2. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination -- Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Highwall." Where a rock face is shown to be the result of a slope failure and is not an open cut through overburden made to expose coal in a mining operation, the face is not properly considered as "highwall," as this term is defined in 30 CFR 710.5, for the purposes of the requirement in 30 CFR 715.14 that all highwalls created in the course of a mining operation must be completely eliminated during reclamation of the minesite.

3. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

The responsibility of a surface coal mine operator to ensure that highwalls created during its mining operations remain covered after backfilling and grading in accordance with 30 CFR 715.14 continues at least for a sufficient period of time to allow the regulatory authority to determine that the highwall has in fact been covered and that the backfill material has been placed and compacted in a manner that properly takes into account the expected settling.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and John C. Martin, Esq., and Walton D. Morris, Jr., Esq., Assistant Solicitor, Enforcement, Division of Surface Mining, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement; George L. Seay, Jr., Esq., Zaluski & Seay, Frankfort, Kentucky, for River Processing, Inc.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed the June 8, 1982, decision of Administrative Law Judge David Torbett (Decision) concerning Notice of Violation (NOV) No. 80-2-56-106, wherein OSM charged River Processing, Inc. (River Processing), with a violation of 30 CFR 715.14 for the company's alleged failure to eliminate completely the highwall at its Abes Branch surface coal mining operation in Perry County, Kentucky. The Administrative Law Judge upheld the violation as alleged, but vacated the remedial requirement in the NOV that River Processing take action to eliminate the remaining highwall exposures. Our decision requires River Processing to take some, but not all, of the remedial action specified in the NOV.

Findings of Fact

For its decision the Board adopts the following findings rendered by the Administrative Law Judge. 1/

1. The Applicant holds Permit No. 297-0422 from the Kentucky Department of Natural Resources and Environmental Protection Agency for the mine involved in this case, which is a contour mine. (Ex. R-2; Hall, 22)

2. All mining and reclamation work on the area which is the subject of this litigation was concluded in the latter part

1/ The terms "applicant" and "respondent" in these findings refer to River Processing and OSM respectively. The citations are to exhibits ("Ex.") introduced during the hearing and to the testimony of named witnesses as reported in the transcript of the hearing.

In these findings we reject the use of the term "highwall" to describe the rock exposures identified in findings Nos. 13, 17, and 19.

of 1979, and a grading bond release has been obtained by the Applicant for the area. (Asher, 188)

3. Throughout the time of the mining operation only two inspections were conducted by the Respondent; one being made in September of 1979, and the final inspection which resulted in this litigation having been made on November 5, 1980. (Campbell, 291)

4. Regular inspections were conducted by the Kentucky Department for Natural Resources and Environmental Protection. (Asher, 183)

5. No inspection by the Department for Natural Resources and Environmental Protection, nor the inspection by the Respondent on September 24, 1979 ever reflected any deficiency in backfilling and grading of the subject permit, except as set out herein in the paragraph immediately following. (Asher, 184; Campbell, 296)

6. During the inspection by the Respondent in September 1979, the Respondent issued a Notice of Violation to the Applicant for placing woody material in the backfill. The Applicant was required to remove the woody material before completing the backfilling. (Campbell, 291, 305-6)

7. Craig Campbell, the Applicant's Safety Director, accompanied the Respondent's Inspector, Marvin Rice, on the inspection on September 24, 1979. During that inspection, Mr. Campbell did not ask Mr. Rice any questions about the adequacy of the backfilling and grading which had been done by the Applicant before that date. (Campbell, 307)

8. Between September 1979 and November 1980, the Applicant did not ask the Respondent to check the adequacy of its backfilling and grading at this mine. (Campbell, 307)

9. The next inspection of this mine by the Respondent was made on November 5, 1980 by Gary Hall. He was accompanied by Craig Campbell for the Applicant during the inspection. (Hall, 21)

10. During his November 5, 19[80] inspection, Mr. Hall observed that the highwall had not been eliminated on portions of this mine. He issued Notice of Violation No. 80-2-56-106 for failure to eliminate the highwall on several portions of the permit area disturbed after May 3, 1978. (Hall, 23-4; Ex. R-1)

11. The initial abatement date for this violation was December 5, 1980. The Applicant requested an extension of time to correct the violation, and the Respondent modified the Notice

of Violation to extend the abatement date to January 5, 1981. (Hall, 32-4; Ex. R-3)

12. Mr. Hall used a copy of the Applicant's permit map to pinpoint the location of the areas where the highwall has not been eliminated. The map is Exhibit R-17. (Hall, 24-6) Mr. Hall took a series of photographs on January 19, 1981, which depict these areas. Each of these photographs has a circled number on the back of the photograph in the upper right-hand corner, which corresponds with the circled red number on Exhibit R-17. (Hall, 40, 57-8; Ex. R-18 - R-31)

13. The first area to which the Notice of Violation pertains is marked as point 3 on Exhibit R-17 and is portrayed in the photographs marked R-6, R-13, R-20, and A-1 through A-4. (Hall, 26-7, 36, 43-4; Campbell, 298-9) Just above the top of the highwall, and protruding out over it in some areas, is the soil and timberline. (Hall, 44) Winford Smith admitted there is 6 inches of soil covering the rock in this area. (Smith, 262-3)

14. Mr. Smith testified that at point 3 the "whole mountain just broke down." (Smith, 226) At the time this event occurred, the Applicant had already "blasted from [its] drill bench to a rider seam which lays over the Number 8 coal." (Smith, 226) The Applicant was removing coal from the rider seam in the area where the mountain broke down." (Smith, 226, 265) The mountain "broke down" because "the little rider seam of coal gave way" as a result of "too much pressure." (Smith, 266)

15. The second area to which the Notice of Violation pertains includes the exposed portions of the highwall behind Hollow Fill No. 2. These areas are found between points 5 and 9 on exhibit R-17 and are portrayed in the photographs R-7, R-8, R-9, R-10, R-14, R-15, R-22, R-23, R-24, R-25, and R-26. (Hall, 27-8, 37-8, 45-9) In most of these areas, the height of the exposed portion of the highwall averages 2-3 feet. (Hall, 45-8) At point 9, however, the highwall averages 6-8 feet. (Hall, 48-9; Ex. R-26) In most of these areas, the highwall is composed mainly of dirt rather than rock. (Hall 47-8).

16. In some portions of the area behind Hollow Fill No. 2, there is no exposed highwall in that some of the disturbed area has been completely restored to its approximate original contour. (Hall 45-6; Ex. R-17, R-22, R-24, R-26; Vaughan, 104)

17. The third area to which the Notice of Violation pertains is marked as point 10 on Exhibit R-17 and is portrayed in the photographs marked R-11, R-16, R-27, A-23, and A-24. (Hall, 29, 38, 49-53; Smith 243-5) The height of the exposed portion of the highwall averages 4-5 feet in this area. (Hall, 49-50) Although there was a lot of rock on this point, the photographs

shows soil and trees mixed with rock and protruding therefrom. (Hall, 29; Vaughan, 111; Ex. R-11)

18. The last area to which the Notice of Violation pertains is found at points 12 and 13 on Exhibit R-17 and is portrayed in the photographs R-12, R-29, R-30. (Hall, 31-2, 55-6)

19. Points 11, 12, and 13 are found at the end of the Applicant's permit, beyond a gap in the mountain. (Hall, 53-6) Although there is exposed highwall at points 12 and 13, the highwall has been eliminated at point 11. (Hall, 53-6; Ex. R-28)

20. According to Mr. Vaughan's testimony, it is possible for backfilled material to settle a small distance (less than 5 percent of the original height of the highwall). (Vaughan, 167) However, since the bench of the mined area was level (Smith, 237), Mr. Vaughan testified that the settling should be uniform along the contour. Exhibit R-22 reveals that the height of the backfilled material is not uniform along the contour; therefore, the exposed highwall is probably not due [entirely] to settling. (Vaughan, 176-7)

21. The photographs show a rocky cliffline in the area of violation, but the cliffline is 25-30 feet above the top of the highwall created by the Applicant's mining operation. (Hall, 71; Ex. R-14, A-6, A-7, A-11, A-15, A-20)

22. The Respondent testified that some areas could be eliminated by regarding the area as they exist. Additional material would have to be hauled in to some locations. The Applicant testified that in order to feasibly eliminate all the area alleged to be in noncompliance by the Respondent, it would be necessary to create a road near the top of the highwall. The material cut out to create the roadway would be put on the outslope "in order to widen out your base or your horizontal distance on the bench. Then material would have to be hauled in along this road and this road filled in. And then the entire slope resloped with a dozer." (Skaggs, 383)

23. Either of the above methods would result in all the present vegetation being destroyed. (Skaggs, 387)

24. No additional topsoil exists in the event additional fill material is placed on the present fill. (Smith, 243)

* * * * *

28. All the witnesses swore truthfully, and are entitled to be believed.

29. There are no irreconcilable questions of fact contained in the record of this case.

(Decision at 2-5.)

The Administrative Law Judge also rendered the following findings, which the Board does not adopt for its decision. As will be apparent from the discussion, infra, we consider these findings to be ultimately irrelevant to the proper application of the regulatory requirement with which we are concerned in this case; additionally, we consider elements of these findings to be overly speculative in light of the record evidence.

25. The area in question is presently stable, and has substantial vegetation on all areas which have been regraded and upon which topsoil has been spread. If the proposed remedial measure were implemented the road which presently exists would be completely eliminated at several points by the need to extend the base of the present fill area. The elimination of the road would create a hazard for dozer operators since there would be no area on which they could rely as a safety barrier in grading the slope. (Skaggs, 381 - 415)

26. The proposed remedial measures sought to be enforced by the Respondent would result in substantial environmental degradation, the destruction of existing topsoil; the destruction of all vegetation which is currently in place on the site; create an unstable area of presently stabilized area; and would generally result in environmental degradation. (Skaggs, 387) If the proposed plan to eliminate all the highwalls was implemented, there would be an increase in the sedimentation to the streams, or additional silt structures would have to be constructed which would themselves create additional sedimentation and environmental degradation. (Skaggs, 414 - 419)

27. If the area remains in its present stable condition no environmental harm will result. (Skaggs, 390)

(Decision at 5.)

These last findings, in combination with his opinion that "the overriding requirement of the [Surface Mining] Act is that strip mining be performed in such a manner that the least damage will be done to the overall environment" (Decision at 7), led the Administrative Law Judge to relieve River Processing from OSM's requirement that the company completely eliminate the remaining highwall at its Abes Branch coal mining operation. Discussion

The issue addressed by the parties in this appeal is whether the requirement in 30 CFR 715.14, that all highwalls created in the course of a surface coal mining operation must be eliminated, can be avoided upon a finding by an Administrative Law Judge that the environmental consequences of eliminating particular highwall exposures would be worse than the environmental consequences of allowing the highwall exposures to remain after back-filling and grading have otherwise been completed in a mining operation. For the reasons stated below, we hold that the regulatory requirement cannot be so avoided; however, our review of the Decision goes beyond the issue addressed by the parties.

[1] Turning first to the issue presented, we find of special relevance the decision of the Board of Surface Mining and Reclamation Appeals (IBSMA) in Tollage Creek Elkhorn Mining Co., 2 IBSMA 341, 87 I.D. 570 (1980), aff'd mem., Tollage Creek Elkhorn Mining Co. v. Watt, No. 80-230 (E.D. Ky., Sept. 1, 1982). In that case IBSMA addressed the question whether a portion of a highwall could be retained after reclamation in connection with

an access road constructed for postmining use at the request of the surface owner. Upon an exhaustive analysis of the requirement to eliminate all highwalls, IBSMA concluded that the requirement could not be avoided even though the State regulatory authority had approved the highwall retention and the record contained convincing evidence that the location of the requested access road along the top portion of the highwall was sensible from engineering and environmental standpoints. See also Grafton Coal Co., 3 IBSMA 175, 88 I.D. 613 (1981). Moreover, IBSMA declined to follow the dissenter's suggestion that the Board could exercise its authority to modify enforcement actions by deleting the remedial action required in the NOV issued in Tollage Creek. Compare 2 IBSMA at 356-57, 87 I.D. at 578-79 (Administrative Judge Mirkin partially dissenting) with 2 IBSMA at 354, 87 I.D. at 577 (Administrative Judge Irwin concurring). There has been no amendment of the language of 30 CFR 715.14 since the issuance of the Tollage Creek decision.

This Board finds to be controlling in this case the construction in Tollage Creek that the requirement for complete highwall elimination is an inflexible element of the reclamation prescribed in 30 CFR 715.14 for the return of land disturbed by surface coal mining to its "approximate original contour." We are persuaded to this viewpoint especially by the fact that none of the several provisions for variances from the "approximate original contour" standard allow retention of highwalls. 30 U.S.C. § 1265(b)(3), (d)(2), and (e) (Supp. V 1981); 30 CFR 715.14(c) through (f) and 716.3; 2 IBSMA at 347-49, 87 I.D. at 574-75 (which includes references to legislative history of the AOC requirement). This circumstance evinces

a preemptive legislative finding that the risk of environmental harm from unreclaimed highwalls outweighs the potential for benefits from a less than absolute requirement for highwall elimination. See especially H.R. Rep. No. 493, 95th Cong., 1st Sess. 108-09 (1977). Thus, we conclude that there is no authority either expressed or implied in the Act or regulations for the evaluation of comparative harms undertaken by the Administrative Law Judge in this case. And it is the actual provisions of the Act and regulations, not the intuitively appealing proposition that "the overriding requirement of the Act is that strip mining be performed in such a manner that the least damage will be done to the overall environment" (Decision at 6-7), that govern the review of this case.

Notwithstanding our disagreement with the basis of the Decision, we affirm in part the result reached in it because our review of the record has persuaded us that not all of the areas identified by OSM in the NOV are "highwall" exposures.

[2] The term "highwall" is defined in the regulations as "the face of exposed overburden and coal in an open cut of a surface or for entry to an underground coal mine." 30 CFR 710.5. Witnesses for River Processing testified that the rock faces in the areas located by the numbers 3, 10, 12, and 13 on OSM's Exhibit 17 are the result of "natural" slope failures above portions of the highwall cut by River Processing and are not parts of the highwalls cut by the company (Asher Tr. 203-06, 209-10, 211; Smith Tr. 226-30, 235-40, 245-51, 264-68; Fugate Tr. 315-20, 323-26 (but see Tr. 326-27); Noble Tr. 338-43, 348-54; and Neace Tr. 359-71). There is nothing substantial in the

evidence adduced by OSM to contradict this testimony (see Hall Tr. 28-32, 36-38, 41-58, 65-73, 91-94; Vaughn Tr. 120-22, 140-42, 427-29). We are not unmindful that the slope failures described by River Processing may very well have been triggered by the company's mining activities and, if so, that the company is responsible for returning these disturbed areas to their approximate original contours. See 30 CFR 715.14. It does not necessarily follow, however, that the rock faces would have to be completely eliminated to meet this performance standard. That would depend on whether the existing rock exposures closely resemble the premining conditions. 30 U.S.C. § 1291(2) (Supp. V 1981); 30 CFR 710.5 (definition of "approximate original contour") and 715.14. In any event, OSM has not charged River Processing with a failure to return the portions of the permit area identified above to their approximate original contours, except upon the erroneous presumption that the rock faces are highwall exposures. We need not determine in this decision whether the record reveals a violation other than that charged by OSM. 2/

Turning to the remaining area of violation identified in the NOV, the area of backfill behind Hollow Fill No. 2, 3/ we reverse the result reached in the Decision in this regard.

2/ Were OSM to so charge River Processing, the company would bear the burden of establishing the premining configuration of the disturbed lands upon OSM's showing of fresh rock exposures remaining after backfilling and final grading by the company. See 30 CFR 715.14(a)(1).

3/ This section of highwall is indicated on Exhibit A-26 by cross-sections 7 through 28, and is described in Finding No. 15, supra. There is some indication in the record that the exposure of highwall in this area may not be continuous; our order takes this uncertainty into account.

The evidence is clear that there is highwall exposed in portions of the area behind Hollow Fill No. 2 (e.g., Smith Tr. 240-41, 252-53, 268-69; Noble Tr. 336-37); however, witnesses for River Processing testified that the company completely eliminated the highwall in this area but that the backfill material has since settled to expose the top portion of the highwall (Smith Tr. 240-41; Noble Tr. 336-37; Neace Tr. 357-58). In reaching his decision to relieve River Processing from the remedial requirement to eliminate this remaining highwall, the Administrative Law Judge nevertheless ruled "that the settling of material placed against the highwall by the applicant does not relieve the applicant of the responsibility for complying with 30 CFR 715.14" (Decision at 6).

[3] While the settling of backfill material is not mentioned in 30 CFR 715.14, there is certainly a mandate for an operator to take it into account implied in the language of that section: "In order to achieve the approximate original contour, the permittee shall * * * transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls." (Emphasis added.) Subparagraph (j)(2) of 30 CFR 715.14 specifies more particularly that "[b]ackfilled materials shall be selectively placed and compacted wherever necessary * * * to ensure the stability of the backfilled materials." It is evident from the record that River Processing failed to place and compact backfilled materials adequately to ensure that the highwall behind Hollow Fill No. 2 would remain completely covered. Thus, while we do not reject the

company's assertion that it covered the highwall during its reclamation operations, we do reject its argument that by temporarily covering the highwall it has completely satisfied its obligation "to eliminate all highwalls." 4/ This Board recognizes that at some time an operator must be relieved of the responsibility for ensuring that a highwall created during its mining operation remains covered. However, this responsibility must continue at least for a sufficient period of time to allow the regulatory authority to determine that the highwall has in fact been covered and that the backfill material has been placed and compacted in a manner that properly takes into account the expected settling. 5/ In our opinion, under the facts of this case, River Processing

4/ We, of course, are aware that some settling of backfilled materials is expectable and cannot be avoided even by the most diligent efforts to compact the material. At the hearing, Inspector Vaughn testified for OSM that he would anticipate less than 5 percent settling after proper compaction under the conditions at River Processing's minesite (Tr. 166-67). This phenomenon poses a special problem in the context of steep-slope mining operations such as the one involved here. The requirement that the permittee eliminate all highwalls completely, as we have construed it, should be able to be satisfied, however, if a permittee places and grades sufficient backfilled material above the level of a highwall to account for reasonably expectable settling. Such a reclamation procedure would appear to be consistent with the relevant provision of 30 CFR 716.2(b): "The highwall shall be completely covered with spoil and the disturbed area graded to comply with the provisions of § 715.14 of this chapter. Land above the highwall shall not be disturbed unless the regulatory authority finds that the disturbance will facilitate compliance with the requirements of this section" (emphasis added). If, in complying with the portion of the remedial action ordered by OSM that we uphold in this decision, River Processing determines that it is necessary to disturb land above the highwall, the company shall consider itself to be authorized to do so in accordance with 30 CFR 716.2(b).

5/ Such a determination, and any subsequent review thereof, may be aided by information furnished by the permittee showing the method of fill placement, method of compacting, the anticipated settling rate, and any additional steps taken to ensure that the highwall will remain covered.

remained responsible for those highwalls created during its mining and exposed at the time of OSM's November 1980 enforcement action. 6/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior under Secretarial Order No. 3092, dated April 26, 1983, and 43 CFR 4.1, the decision of the Administrative Law Judge, Docket No. NX 1-52-R, is affirmed in part, as modified, and reversed in part. 7/

Bruce R. Harris
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

R. W. Mullen
Administrative Judge

6/ In responding to OSM's appeal, River Processing did not repeat its argument, advanced in the proceeding below, that OSM should be equitably estopped from taking enforcement action against the company with respect to any highwall exposures because OSM did not charge the company with a violation during its Sept. 24, 1979, inspection, when backfilling and grading were substantially completed, and OSM did not inspect the mine site again for 14 months even though the Surface Mining Act and regulations call for inspections to occur at least once every 6 months. We have taken note of River Processing's argument, however, and in this regard we refer to the general rule of this Department that "[t]he authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties." Virgil V. Peterson, 66 IBLA 156, 159 (1982), and citations therein.

7/ Consistent with this decision, OSM shall take such enforcement action as is necessary to require River Processing to eliminate completely any appreciable exposure of highwall remaining in the area identified by the numbers 7 through 28 on Exhibit A-26 of the record in this case.

